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Case No. _____

UNITED STATES SUPREME COURT
1984 Term

LEO L. MARTELON,

Petitioner,

v.

HERBERT R. TEMPLE, JR., Director of the National Guard Bureau; JOHN L. FRANCE, Adjutant General of the Colorado Department of Military Affairs; WILLIAM K. WHITE; PAUL A. PARSONS; STEPHEN T. ERICKSON; and JAMES T. MILLER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner has a valid claim for monetary or injunctive relief under 42 U.S.C. §1983 for violation of his fourteenth amendment right to due process when he was terminated from his non-probationary National Guard civilian technician employment, without a hearing, during his term of military enlistment; and

2. Whether the Colorado Army National Guard had the authority under 32 U.S.C. §709(e) to terminate the Petitioner's National Guard technician employment solely because it had reassigned him militarily to a unit other than the one in which he was employed as a civilian technician.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

LEO L. MARTELON, Petitioner,

v.

HERBERT R. TEMPLE, JR., Director of the National Guard Bureau; JOHN L. FRANCE, Adjutant General of the Colorado Department of Military Affairs; WILLIAM K. WHITE, PAUL A. PARSONS, STEPHEN T. ERICKSON, and JAMES T. MILLER, Respondents.

PETITION FOR WRIT OF CERTIORARI

Leo L. Martelon petitions that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

REPORTS OF THE DECISIONS BELOW[1]

The Opinion of the Tenth Circuit Court of Appeals is reported at *Martelon v. Temple,* 747 F.2d 1348 (10th Cir. 1984), and appears in the Appendix (hereinafter, "Appendix") at 1-7.[2] The Order of the United States District Court for the District of Colorado, from which Petitioner had appealed to the Tenth Circuit, is reported at *Martelon v. Walker,*[3] 568 F.Supp. 672 (D.Colo. 1983), and appears at App. 9-11.

[1] All parties, with the exception of Emmett H. Walker (fn. 3, *infra*) are listed in the caption.

[2] Due to its length, the Appendix is printed under separate cover.

[3] Petitioner filed his Complaint against Emmett H. Walker in his official capacity as Director of the National Guard Bureau. After the District Court entered its Order, Major General Herbert R. Temple, Jr., succeeded General Walker in this position and was substituted as a party in the Tenth Circuit.

JURISDICTION

The judgment of the Tenth Circuit was entered on November 8, 1984. A timely petition for rehearing was denied on December 7, 1984. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Section 1 of the fourteenth amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

32 U.S.C. §709(e)(1-3) provides:

> Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—
>
> (1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from

his technician employment by the adjutant general of the jurisdiction concerned;

(2) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who fails to meet the military security standards established by the Secretary concerned for a member of a reserve component of the armed force under his jurisdiction may be separated from his employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;...

32 U.S.C. §101(10) provides:

> "Grade" means a step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation.

Due to its length, Technician Personnel Regulation 302.7-3 (March 17, 1981) is set out verbatim in the Appendix. App. 15-16. The most pertinent portion reads:

a. The following are requisite for technician employment:

(1) All technicians must maintain appropriate military membership, military grade, and branch of service (except as provided for in paragraph 7-9) for the technician position occupied; meet the required military security standards; and meet the military physical requirements appropriate for the compatible military assignment.

(2) General officers may not be employed as technicians, unless a technician position description requires the incumbent to be a commander of a tactical combat unit.

(3) Technicians may not be assigned as Assistant/ Deputy Adjutant General.

b. Technicians who do not meet the above will be given a written 30-day advance notice of termination and promptly separated.

Due to its length, Technician Personnel Regulation 302.7-9 (March 17, 1981) is set forth verbatim in the Appendix. App. 17. The most pertinent portion reads:

> A National Guard technician must be assigned to an appropriate military unit (to include military grade and specialty) in the State where his technician job is located (see 32 U.S.C. 709(b)). The concept of the National Guard technician program is that technicians will be militarily assigned to the same unit in which his technician job is located. In other words, a technician will perform his technician duties, his military training duties, and be mobilized to active duty in the same unit. Unless specifically approved by NGB-TN, the assignment will be in the unit by which employed, and the technician must be performing in the MOS/AFSC determined to be compatible with the technician position occupied. Situations of military or technician grade inversion are not permitted; i.e., a technician is subordinate to an individual in technician status but senior to him in a military status.

Due to its length, Technician Personnel Regulation 752.2-3 (August 16, 1982) is set out verbatim in the Appendix. App. 19. The most pertinent portion reads:

> a. When a technician can no longer meet the requirements of the technician position, removal from the position is required. This includes such situations where a technician loses flying status; is physically unable to perform his duties; fails to meet the security standards of his compatible military assignment; fails to meet the medical requirements of his technician position/compatible MOS/AFSC; or fails to maintain the military grade/rank, branch of service, or compatible military assignment for the technician position occupied.

National Guard Regulation 600-200, Par. 1-4.k. (September 1, 1978) provides: "k. Grade. Refers to pay grade, unless otherwise specified."

STATEMENT OF THE CASE

On November 3, 1974, Petitioner Leo L. Martelon commenced his employment as a civilian technician employed in the 220th Military Police Company of the Colorado Army National Guard (App. 2). Mr. Martelon previously had been informed in writing that his employment "is contingent upon membership in the Army National Guard" *(Id.)* and

had enlisted in the same unit two days before the effective date of the commencement of his civilian technician employment.

Mr. Martelon's term of military enlistment, which originally was only for one year, was extended twice—the first time until October 31, 1990; and the second time, until October 31, 1991. On the civilian side, his technician employment status was changed from a conditional to a non probationary appointment after he had satisfactorily completed a one-year probationary period. Mr. Martelon eventually received promotions as a civilian technician from a GS-5 to a GS-7 position.

On June 21, 1981, Respondent Stephen T. Erickson relieved Mr. Martelon's military unit commander of his military command of the 220th Military Police Company and relieved Mr. Martelon from his military assignment as First Sergeant of that unit, stating that Mr. Martelon would "assume the duties of Operations Sergeant in this headquarters." Written orders dated the same day stated that Mr. Martelon was being transferred to the 193rd Military Police Battalion headquarters.

Two days later, Mr. Martelon received a Notice of Separation, which stated that he was being separated from the technician force because of the loss of his military/technician compatibility. Specifically, this notice claimed, "Chapter 302.7 of Technician Personnel Regulation 300 and Title 32 U.S.C. 709e, requires a technician be compatible and militarily assigned to the same unit in which his/her technician job is located." Mr. Martelon's civilian technician employment was terminated effective August 1, 1981.

Respondents never provided Petitioner with a hearing with respect to the termination of his civilian technician employment. Mr. Martelon made several efforts to obtain a reversal or reconsideration of the military reassignment decision—including written communications with Respondent Erickson; with Respondent John L. France, the Adjutant General for the State of Colorado; and with Respondent Paul A. Parsons, then an intermediate-level commander—but he was not successful in any of these efforts.

Mr. Martelon then filed a Complaint in the District Court. The District Court had jurisdiction under 28 U.S.C. §§1331 and 1343(a)(3). The Complaint included allegations that the involuntary military reassignment and the termination of Mr. Martelon's civilian employment were taken under color of state law and deprived Mr. Martelon of his constitutional rights to due process, in violation of 42 U.S.C. §1983;

and that the termination of his civilian technician employment was void because it was contrary to 32 U.S.C. §709(e). The Complaint requested reinstatement, back pay and benefits, compensatory and punitive damages, and attorney's fees and costs.

After extensive discovery, the parties filed cross-motions for summary judgment.[4] The District Court entered summary judgment for Respondents and against Petitioner, ordering dismissal of the action with prejudice. The District Court, relying upon *Gilligan v. Morgan,* 413 U.S. 1 (1973), concluded that Petitioner's §1983 claim "raises issues not appropriate for determination in this court," and that "[a] federal trial judge is not competent to review decisions of Army National Guard officers in assigning personnel, at least in the circumstances here presented." App. 10. The District Court further concluded that "a civilian technician ceases to hold the requisite 'military grade' when he or she is reassigned to a military unit from which the civilian technician duties cannot be performed," and that the termination of Petitioner's employment was authorized by 32 U.S.C. §709(e)(1). App. 11. The District Court additionally concluded that "the Guard has the inherent power necessary to terminate a technician's employment if the technician's reassignment to a different military unit is incompatible with his or her civilian employment." *Id.*

The Tenth Circuit affirmed. It relied in part on this Court's decision in *Chappell v. Wallace,* 462 U.S. 296, 103 S.Ct. 2363, 76 L.Ed.2d 586 (1983), even though the *Chappell* case involved a claim brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), while Petitioner's claim was brought pursuant to §1983. App. 3-4. The Tenth Circuit concluded that Petitioner's "§1983 claim has no merit," reasoning that "[b]efore the passage of §1983, there was no liability on the part of military superiors for transgressions against the rights of other military personnel. By the passage of §1983, Congress never intended to create such rights." App. 4-5.

The Tenth Circuit also concluded that the reason given for the termination of Petitioner's employment was authorized by 32 U.S.C. §709(e). It agreed with the District Court's holding that "a civilian technician

[4] Specifically, Respondents moved for summary judgment, and Petitioner moved for partial summary judgment. Petitioner maintained that, even if the District Court entered summary judgment in his favor on the major issues of liability, there existed genuine issues of material fact on individual liability, immunity, and the amount of damages and back pay and benefits.

ceases to hold the requisite 'military grade' when he or she is reassigned to a military unit from which the civilian duties cannot be performed," App. 7, and therefore Respondents were authorized to terminate Petitioner's employment without any hearing under the provisions of 32 U.S.C. §709(e)(1) dealing with loss of military grade.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION THAT A NATIONAL GUARD TECHNICIAN HAS NO VALID §1983 CLAIM FOR THE TERMINATION OF HIS TECHNICIAN EMPLOYMENT IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME MATTER.

Three circuits have entertained actions under 42 U.S.C. §1983 to protect technicians' due process rights in connection with the termination of their civilian employment. The Fifth Circuit articulated the legal conclusion central to all of these decisions in holding that, while a technician "was a military member of the Georgia Air National Guard otherwise eligible for continued employment under 32 U.S.C. §§ 709(e)(1) and (2), he had a protected property interest in his civilian employment that could not be denied absent a justified finding of 'cause' for removal following a due process hearing." *NeSmith v. Fulton,* 615 F.2d 196, 200 (5th Cir. 1980). The Fifth Circuit earlier had held, relying on this Court's decision in *Arnett v. Kennedy,* 416 U.S. 134 (1974), that a post-discharge hearing satisfied a National Guard technician's due process rights. *Davis v. Vandiver,* 494 F.2d 830 (5th Cir. 1974).[5]

The Third Circuit also has recognized a technician's right to bring a §1983 claim to protect his constitutional rights. *Lasher v. Shafer,* 460 F.2d 343 (3d Cir. 1972). In concluding that probationary technicians are not entitled to the same due process protections as technicians who have completed their probationary employment, the Third Circuit found that

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[5] Petitioner is aware that this Court has granted certiorari and heard oral argument in three consolidated cases involving the issue of whether school districts must grant pretermination evidentiary hearings for civil service employees. *Cleveland Board of Education v. Loudermill,* Docket No. 83-1362; *Parma Board of Education v. Donnelly,* Docket No. 83-1363; *Loudermill v. Cleveland Board of Education,* Docket No. 83-6392. That is not the central issue in this case. Rather, the issue is whether Respondents violated Petitioner's due process rights by not holding or offering *any* hearing in connection with the termination of his employment.

the "termination for cause" provision in 32 U.S.C. §709(e)(3) accorded all nonprobationary technicians "an assurance of continuing employment similar to that given other federal employees." *DiLuigi v. Kafkalas,* 584 F.2d 22, 25 (3d Cir. 1978) *cert. denied,* 440 U.S. 959 (1979).

The Sixth Circuit, following *Lasher,* has held that the termination of National Guard technicians' employment constitutes action under color of state law and that such technicians therefore stated §1983 claims based on these personnel actions. *Rowe v. State of Tennessee,* 609 F.2d 259 (6th Cir. 1979); *Schultz v. Wellman,* 717 F.2d 301, 304-06 (6th Cir. 1983).

The decisions in these other Circuits are diametrically opposed to the Tenth Circuit's conclusions in this case. This majority view is also supported by this Court's opinion in *Tennessee v. Dunlap,* 426 U.S. 312 (1976), another §1983 case. *See Dunlap v. State of Tennessee,* 514 F.2d 130, 131 (6th Cir. 1975). This Court held that a National Guard technician was not entitled to either a hearing or a copy of charges against him when the Guard terminated his technician employment under §709(e)(1) because he had ceased to be a military member of the National Guard. This Court implied that a technician in Petitioner's situation is entitled to due process protection in connection with the termination of his or her employment when it stated that §709(e)(3) cannot "provide the foundation for any due process claim in this case, since the property interest it creates in continued employment is confined, in all events, to the guardsman's term of enlistment." 426 U.S. at 316.

The Tenth Circuit's decision in this case is in conflict with the decisions of these other Circuits. Petitioner was a nonprobationary technician whose employment was terminated more than ten years before the scheduled end of his enlistment, *see* discussion *supra* at 5, and who therefore had not been separated from the National Guard. 32 U.S.C. §709(e)(1). Nor was Petitioner's security clearance involved in the termination of his technician employment. *See* 32 U.S.C. §709(e)(2). As discussed *infra* at 13-15, his involuntary military reassignment to a different unit did not cause him to lose the "military grade" required for his position. 32 U.S.C. §709(e)(1). The only other statutory ground for terminating Petitioner's employment was the "separation for cause" provisions of §709(e)(3), but this would require that Petitioner be afforded a hearing. *Davis v. Vandiver, supra.* Although Petitioner

received no hearing even after his discharge, the Tenth Circuit concluded that Petitioner's "§1983 claim has no merit." App. 5.

Petitioner submits that this Court should review this decision to resolve this conflict in the Circuits. If it does not, National Guard technicians employed within the geographic boundaries of the Tenth Circuit will be denied the same right to bring §1983 claims as is enjoyed by technicians employed within the geographic limits of the Third, Fifth, and Sixth Circuits. This Court should establish a uniform rule requiring due process and providing a means to enforce these rights, for all National Guard technicians.

II. THE TENTH CIRCUIT'S REASONS FOR DENYING PETITIONER'S §1983 CLAIM CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

In *Chappell v. Wallace, supra,* this Court held that "it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." 103 S.Ct. at 2367. It decided, however, to "leave it for the Court of Appeals to decide on remand whether the portion of respondents' suit seeking damages flowing from an alleged conspiracy among petitioners in violation of 42 U.S.C. §1985(3) can be maintained." 103 S.Ct. at 2368, n. 3.

Different Circuits have applied the *Chappell* decision to Reconstruction-era civil rights statutes in different ways. The Sixth Circuit's decision in *Schultz v. Wellman, supra,* though handed down after *Chappell,* did not discuss the possible effect of this decision. In contrast, the Ninth Circuit concluded that "military officers may not sue their superiors under §1985(1), at least where the §1985(1) claim involved only the alleged violation of a statute." *Mollnow v. Carlton,* 716 F.2d 627, 630-32 (9th Cir. 1983).[6] Another panel of the Ninth Circuit decided not to apply *Chappell* directly to bar a §1981 racial discrimination claim brought by a United States Army Captain, *Gonzales v. Dept. of Army,* 718 F.2d 926, 929-30 (9th Cir. 1983), choosing instead to conclude that judicial review of the military decisions involved in that

[6] The Ninth Circuit noted that it was "not faced with the question of whether a statutory claim based on a constitutional violation is subject to the result announced in *Chappell.*" 716 F.2d at 631. Petitioner's §1983 allegations involve the precise category of claims not addressed in *Mollnow.*

case was inappropriate under the standards set forth in *Mindes v. Seaman,* 453 F.2d 197 (5th Cir. 1971).[7]

Meanwhile, the Eighth Circuit, in *Brown v. United States,* 739 F.2d 362, 367 (8th Cir. 1984), stated in *dictum* that it could not find "a reasoned distinction for the purposes of the *Feres*[8] doctrine between *Bivens*-type actions under the Constitution and actions brought under a federal civil rights statute." The Eighth Circuit, however, held in *Brown* that a National Guardsman could bring §§1981 and 1983 claims for racial assault and harassment against fellow guardsmen for their activities at an on-base weekend drinking party.

The Tenth Circuit took a different approach in this case. It discussed this Court's opinion in *Chappell,* including the language in that opinion stating: "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment." 103 S.Ct. at 2365. The Tenth Circuit went on to discuss the citation in *Chappell* to this Court's earlier opinion in *Feres v. United States, supra,* and the holding in the *Feres* decision. App. 4. It then concluded, reasoning by analogy from one of the grounds used by this Court to support its decision in *Feres, supra,* that there allegedly was no pre-§1983 "liability on the part of military superiors for transgressions against the rights of other military personnel;" that Congress "never intended to create such rights" in enacting §1983; and that, therefore, Petitioner had no valid §1983 claim. App. 5.

These decisions have chosen widely divergent approaches in deciding whether and to what extent this Court's opinion in *Chappell* applies to actions under the Civil Rights Acts. Different decisions have refused to apply *Chappell,* have held that it applies under certain circumstances, applied it as a factor on the issue of reviewability, and used it as a guide for ascertaining the intent of the 42nd Congress in enacting §1983. It is impossible to predict what approaches might be followed in future decisions and whether a dominant line of authority will emerge. Under these circumstances, this Court should exercise its power of supervision

[7] The Ninth Circuit's decision in the *Chappell* case, *Wallace v. Chappell,* 661 F.2d 729 (9th Cir. 1981)—which this Court reversed—had relied in part on the *Mindes* case. The *Gonzales* opinion cited this Court's decision in *Chappell* to support the Ninth Circuit's conclusion on nonreviewability under the *Mindes* standards. 718 F.2d at 930.

[8] *Feres v. United States,* 340 U.S. 135 (1950).

to resolve the question it left open in *Chappell v. Wallace, supra,* to establish a uniform approach on this issue.

Even if this problem did not exist, the Tenth Circuit's decision in this case so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. At least four reasons militate in favor of this Court's intervention in this case.

First, the Tenth Circuit implied that the only difference between *Chappell* and this case "is due to the identity of the defendants." App. 4. In *Chappell,* this Court held that it would not extend the scope of a judicially created damage remedy in a way that "would be plainly inconsistent with Congress' authority in this field," 103 S.Ct. at 2367; in contrast, this case involves judicial interpretation of the scope of a remedy created by Congress. This distinction between judicial self-restraint and statutory interpretation mirrors another central principle of *Chappell*—that courts should hesitate to interfere with Congress' "plenary constitutional authority over the military." *Id.* at 2366. Here, Congress carefully balanced the civilian and military aspects of technician employment. On the one hand, it required part-time military membership for most technicians, including appropriate military grade and security clearance. On the other hand, it permitted termination only "for cause"—the most fundamental right of civilian public employees—of technicians who meet these military requirements. The Tenth Circuit's decision in this case alters this carefully crafted Congressional scheme by approving termination of technicians' employment without a hearing for a reason not specified in §709(e), thereby effectively eviscerating the termination "for cause" protections in this statute.

Further, the remedies created by Congress in the Uniform Code of Military Justice, upon which this Court relied in *Chappell,* do not apply to National Guard personnel who are not in the active federal service. 10 U.S.C. §802(3); *Rasmussen v. Seamans,* 432 F.2d 346 (10th Cir. 1970). Nor, unlike the *Chappell* plaintiffs, could the correction of Petitioner's military records have provided him with any meaningful relief in this case, since the Board for Correction of Army Records could not have ordered petitioner to be reinstated in his civilian employment. *See Rolles v. Civil Service Comm'n,* 512 F.2d 1319, 1326-27 (D.C. Cir. 1975). Moreover, the Tenth Circuit apparently assumed that every §1983 claim would have a disruptive effect on military discipline, rather than analyzing carefully whether the specific relief that Petitioner seeks in this

case — legal and injunctive relief based on his deprivation of a hearing — would have this same effect.

Second, the Tenth Circuit's decision was historically inaccurate in concluding that "[b]efore the passage of §1983, there was no liability on the part of military superiors for transgressions against the rights of other military personnel." App. 4-5. Before 1871, this Court had held that a military superior officer was liable for an intentional tort against a seaman under his command if the superior officer's actions were done "from malice to an individual, or a vindictive feeling, or a disposition to oppress..." or if such actions were "forbidden by law, or beyond the power which the law confided to him." *Wilkes v. Dinsman,* 7 How. (48 U.S.) 89 (1849); *Dinsman v. Wilkes,* 12 How. (53 U.S.) 389, 404 (1851).

Third, the Tenth Circuit's opinion in this case was historically inaccurate in concluding that "Congress never intended to create such rights" in enacting §1983. Its citation to this Court's opinion in *Allen v. McCurry,* 449 U.S. 90, 98-99 (1980), apparently is to a passage in that opinion referring to the Congressional intent "to override the corrupting influence of the Ku Klux Klan and its sympathizers in the governments and law enforcement agencies of the Southern States." Neither Congress nor this Court has given such a narrow interpretation to §1983, originally enacted at §1 of the Civil Rights Act of 1871. "By enacting a remedy to all people, including whites, §1 went beyond the mischief to which the remaining sections of the 1871 act were addressed." *Monell v. Dept. of Social Services,* 436 U.S. 658, 683 (1978). *See generally* the remarks of Representative Samuel Shellabarger, quoted in *Owen v. City of Independence,* 445 U.S. 622, 636 (1980).

Fourth, the Tenth Circuit drew no distinction between Petitioner's claims for legal and injunctive relief. In *Chappell,* this Court stated that it "has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." 103 S.Ct. at 2367. The three cases this Court cited in support of this proposition all involved actions for injunctive relief, in which this Court reviewed the claims of military personnel on their merits. *Brown v. Glines,* 444 U.S. 348 (1980); *Parker v. Levy,* 417 U.S. 733 (1974); *Frontiero v. Richardson,* 411 U.S. 677 (1973). The Tenth Circuit seems to have established a *per se* rule against §1983 claims for injunctive and monetary relief by National Guard technicians or military personnel against their superiors, thereby going far beyond this Court's prior decisions in this area.

III. THE TENTH CIRCUIT'S DECISION ON PETITIONER'S STATUTORY CLAIM SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

One of Petitioner's claims, both in the District Court and in the Tenth Circuit, was that Respondents had no authority under 32 U.S.C. §709(e) to terminate his civilian technician employment merely because they had changed his part-time military assignment to a different unit than the one in which he was employed as a technician. The Tenth Circuit held that Respondents did have this statutory authority under §709(e)(1), since this military transfer allegedly caused Petitioner to lose "the military grade specified for his position." App. 5.

This conclusion is manifestly erroneous. Congress expressly defined the term "military grade" to mean "a step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation." 32 U.S.C. §101(10). National Guard Regulation 600-200, Para. 1-4.k. (September 1, 1978) similarly defined the term "grade" to refer "to pay grade, unless otherwise specified." Nowhere in §709, indeed nowhere in Title 32 of the United States Code, is the term "military grade" defined as meaning the military unit in which a National Guard officer or enlisted person is serving.

The Tenth Circuit's definition of "military grade" violates extremely basic canons of statutory interpretation. "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Caminetti v. United States,* 242 U.S. 470, 490 (1917). If statutory language is unambiguous, then, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Products Safety Comm'n. v. GTE Sylvania,* 447 U.S. 102, 108 (1980); *United States v. Turkette,* 452 U.S. 576, 580 (1980).

Moreover, the Tenth Circuit misstated the Congressional intent in enacting §709. The Tenth Circuit relied in part on language in the Report of the Senate Armed Services Committee, which stated, "It is the view of the Committee, therefore, that technicians who are required to be military members of the National Guard should occupy a military position which is compatible with their civilian technician position." S.Rep. No. 1446, 90th Cong., 2d Sess. at 20 (1968). This language,

however, appeared in the "Committee Observations" section of the Senate Report, stating the Committee's views on subjects that were "not dealt with in explicit language in the bill." *Id.* at 19. No similar language appears in the House Report, 1968 U.S. Code Cong. & Admin. News 3318, nor in the debates on the floor of either the House or the Senate. The only other legislative citations in the Tenth Circuit's decision in this case are citations to very general language dealing with the multiple ways in which National Guard technicians carry out their public service, and which do not discuss either the general question of military/technician compatibility or the more specific issue of whether such compatibility is a condition of technician employment. In other words, there is no evidence that a majority of the House and Senate, as opposed to a majority of the members of one Senate committee, supported a strict requirement of military unit/technician compatibility.

The Tenth Circuit's decision in this case even misinterpreted the policy objective of the Senate Armed Services Committee. The Report of this Committee noted, in a sentence not quoted by the Tenth Circuit, "[T]he committee did learn in some instances technicians hold military assignments in units different from the units in which they are employed." S.Rep. No. 1446, 90th Cong. 2d Sess. at 20 (1968). The clear purpose of this Committee report was to prompt the National Guard to correct this situation. No indication exists that the Senate Armed Services Committee, let alone the entire Senate or House, intended the solution to be the peremptory removal of all incompatibly assigned technicians.

Nor do the regulations cited by the Tenth Circuit support its decision in this case. The Tenth Circuit claimed that Petitioner "was terminated under Technician Personnel Regulation 302.7-9," App. 5, yet this regulation said nothing about termination of technicians who failed to meet the compatibility standards set forth therein. The "Employment Policy" provision of this same regulation, Technician Personnel Regulation 302.7-3, did not authorize the termination of a technician's employment for lack of military/technician compatibility and, in fact, did not even mention this subject. The Tenth Circuit further claimed that Technician Personnel Regulation 752.2-3 (August 16, 1982) "mandates removal of technician employment" for lack of compatibility, App. 6. Yet this regulation went into effect more than one year after the termination of Petitioner's employment.

Even assuming *arguendo* that these regulations are valid and authorized the termination of Petitioner's employment, the Tenth Circuit ignored the fact that Respondents violated these regulations in reassigning Petitioner to a different military unit. Clearly, these regulations required the National Guard to assign technicians to compatible military and civilian positions; Technician Personnel Regulation 302.7-9, for example, states that "[a] National Guard technician *will be assigned* to an appropriate military unit" (emphasis supplied). Respondents not only violated these regulations by reassigning Petitioner in an incompatible fashion, but then argued that their own violations mandated the termination of Petitioner's employment. An agency's failure to comply with its own regulations renders its actions contrary to law. *Accardi v. Shaughnessy,* 347 U.S. 260 (1954).

The decision of the Tenth Circuit in this case will have an impact on far more people than merely the Petitioner. Congress has provided that, with the exception of the narrowly limited circumstances described in subsections (1) and (2) of 32 U.S.C. §709, the National Guard can terminate a nonprobationary technician's employment only "for cause" and, as other Circuits have held, only after a hearing. If the Tenth Circuit's decision is allowed to stand, an enormous loophole in this statutory scheme would result: National Guard personnel could avoid the inconvenience and uncertainty of a hearing merely by reassigning a technician to a different military unit and then terminate that technician's employment for loss of compatibility. This would eviscerate the "for cause" protections in §709(e)(3), with great consequences for the morale of the more than 55,000 technicians employed nationwide.

CONCLUSION

For the reasons stated herein, Petitioner Leo L. Martelon requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in this case.

Respectfully submitted,

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CLERK

Case No. _____

UNITED STATES SUPREME COURT
1984 Term

LEO L. MARTELON,

Petitioner,

v.

HERBERT R. TEMPLE, JR., Director of the National Guard Bureau; JOHN L. FRANCE, Adjutant General of the Colorado Department of Military Affairs; WILLIAM K. WHITE; PAUL A. PARSONS; STEPHEN T. ERICKSON; and JAMES T. MILLER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX 1

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LEO L. MARTELON,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	
	)	No. 83-2141
HERBERT R. TEMPLE, JR., Director of the National Guard Bureau; JOHN L. FRANCE, Adjutant General of the Colorado Department of Military Affairs; WILLIAM K. WHITE, PAUL A. PARSONS, STEPHEN T. ERICKSON, and JAMES T. MILLER,	)	
	)	
Defendants-Appellees.	)	
	)	
NATIONAL FEDERATION OF FEDERAL EMPLOYEES,	)	
	)	
Amicus Curiae.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 81-C-2196)

Barry D. Roseman of Denver, Colorado for Plaintiff-Appellant

Nancy E. Rice, Assistant U.S. Attorney, Denver, Colorado, for Defendant-Appellee Herbert R. Temple, Jr.

William F. Eggert of Hall & Evans, Denver, Colorado for Defendants-Appellees, France, White, Parsons, Erickson and Miller.

Catherine Waelder, General Counsel and Clinton D. Wolcott, Staff Attorney for National Federation of Federal Employees, Washington, D.C., submitted a brief for Amicus Curiae.

Before LOGAN, BREITENSTEIN and McWILLIAMS, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This is an appeal from the district court's summary judgment for the defendant-appellees. Plaintiff-appellant claims that he was involuntarily reassigned within, and dismissed from, the Colorado Army National Guard in violation of 42 U.S.C. § 1983 and 32 U.S.C. § 709(e). Jurisdiction lies under 28 U.S.C. § 1331 and § 1343(a)(3). We affirm.

The defendants are all officers of the Colorado Army National Guard, COARNG. In this court Major General Herbert R. Temple, Jr. was substituted for Emmet H. Walker, Jr. as Director of COARNG.

Martelon, plaintiff-appellant, sought full-time employment in the COARNG as an administrative supply technician. He was informed in writing that his employment was "contingent upon membership in the Colorado National Guard." R. 337. He enlisted in the Guard on November 1, 1974, was employed as an administrative supply technician on November 3, 1974, and assigned to the 220th Military Police Company. His duties required that he supervise military material for his unit. On June 21, 1983, he was involuntarily reassigned to the 193rd Police Battalion. No comparable civilian activity was available in the 193rd Police Battalion. On August 1, 1983, his civilian job was terminated because his new military assignment was incompatible with his continued civilian employment as an administrative supply technician.

Plaintiff then filed this suit seeking relief from his termination as a technician in the Guard. He alleged three grounds for relief. First, appellees breached his contract by involuntarily transferring him from one military unit to another. He does not pursue this ground on this appeal. See appellant's brief, p. 4, n. 4. Second, appellees violated his constitutional rights in not affording him a hearing before his termination as a technician of 42 U.S.C. § 1983. Third, appellees violated 32

U.S.C. § 709(e) by terminating his employment for a reason not specified in the statute. The court granted summary judgment for the appellees. There is no issue of material fact. Our review is limited to whether the court correctly applied the substantive law. Western Cas. & Sur. v. National Union Fire Ins., 10 Cir., 677 F.2d 789, 791, n. 1.

Plaintiff does not contest that appellees had the authority to transfer him to a different military unit. The trial court noted, R. 454, that,

> "...plaintiff has not cited, and I have not found, any section of the enlistment contract either guaranteeing his assignment to a specific military unit or limiting the Guard's ability to reassign him."

The enlistment contract signed by plaintiff specifically says, R.68:

> "I have had this contract fully explained to me, I understand it, and certify that *no promise* of any kind has been made to me concerning assignment to duty..." [Emphasis supplied.]

The United States Constitution in Art. 1, § 8, cl. 12-16, grants control of the Military to the Congress and not to the courts. As said in Chappel v. Wallace, ___U.S.___, 103 S.Ct. 2362, 2366:

> "It is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline:..."

In Chappell the Court held that "military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." Id. at 2368. In Chappell, five enlisted men of the United States Navy brought an action against their military superiors pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, claiming that because of their minority race defendants failed to assign them desirable duties, gave them low performance valuations, threatened them, and imposed penalties of unusual severity. Bivens held that federal officers may be sued for damages arising out of civil rights violations.

In refusing to allow a Bivens remedy for military personnel against their superior officers, the Court said, Chappell, supra, 103 S.Ct. at 2365:

> "Civilian courts must, at the very least, hesitate long before

> entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment."

In Gilligan v. Morgan, 413 U.S. 1, the Court refused to entertain a suit by university students under § 1983 asking that the courts examine the pattern of training, weaponry and orders of the Ohio National Guard, saying, Id. at 10:

> "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence."

Plaintiff's reliance on Johnson v. Orr, No. 82-2578 D.C.N.J. is misplaced. In that case, technicians claimed that they were terminated as a result of their union activities. In declining to follow Chappell, the New Jersey district court found that the technicians' claims were incident to their civilian, not military, employment. In the case at bar, termination following his involuntary military transfer is clearly related to military employment. The record amply demonstrates the dissatisfaction of plaintiff's superiors with plaintiff's military performance. R. 78-145. The record also shows that the dissatisfaction was the cause of plaintiff's transfer.

Chappell involved a Bivens claim, while here § 1983 is the basis for relief. The difference is due to the identity of the defendants. In Bivens they were federal officers. Here they are state officers and federal relief must be based on § 1983. In Chappell the Court failed to address the § 1985 claim brought by the enlisted men against their superiors. The Court stated that its decision in Feres v. United States, 340 U.S. 135, guided its analysis in Chappell. Supra, 103 S.Ct. at 2365. In Feres the Court held that the Federal Tort Claims Act did not extend to injuries suffered by military personnel in service. The Court pointed out that no such liability existed before the Federal Tort Claims Act and that Congress never intended to create such liability.

Before the passage of § 1983, there was no liability on the part of military superiors for transgressions against the rights of other military

personnel. By the passage of § 1983, Congress never intended to create such rights. See the Court's review of the legislative history of § 1983 found in Allen v. McCurry, 449 U.S. 90, 98-99. The plaintiff's § 1983 claim has no merit.

Plaintiff argues that defendants terminated him for a reason not specified in the statute. Section 709(e)(1), 32 U.S.C., provides:

> "Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned."

The district court found, R. 455, that "a civilian technician ceases to hold the requisite 'military grade' when he or she is reassigned to a military unit from which the civilian technician duties cannot be performed." Plaintiff says that because grade is defined in 32 U.S.C. § 101 (10) to mean "a step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation," the district court is wrong. The defendants say that the statute anticipates that it shall be expanded by the promulgation of regulations. Section 709(a) provides that "[u]nder *regulations prescribed* by the Secretary of the Army or the Secretary of the Air Force...persons may be employed as technicians in...the National Guard." [Emphasis supplied.] Section 709(e) begins "[n]ot withstanding any other provision of law *and under regulations* prescribed by the Secretary concerned..." [Emphasis supplied.]

Plaintiff was terminated under Technician Personnel Regulation 302.7-9 which reads, R. 262:

> "A National Guard technician must be assigned to an appropriate military unit (to include military grade and specialty) in the State where his technician job is located (see 32 U.S.C. 709(b)). The concept of the National Guard technician program is that technicians will be militarily assigned to the same unit in which his technician job is located. In other words, a technician will perform his tech-

nician duties, his military training duties, and be mobilized to active duty in the same unit."

Technician Personnel Regulation 752.2-3, brief of Amicus Curiae, Add. 55, mandates removal of technician employment when a technician "fails to maintain the military grade/rank, branch of service, or compatible military assignment for the position occupied."

The question is whether the regulations are consistent with § 709(e). The rule-making authority granted to an administrative agency is not power to make law. Rather it is "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-214. Resort is to the legislative history of the National Guard Technicians Act of 1968, of which § 709(e) is a part. See United States v. Earth Sciences, Inc., 10 Cir., 599 F.2d 368, 372. The legislative history of the Act shows that Congress considered that the military mission of the technicians was paramount and that the technician's duties were inseparable from his or her military obligations. See American Federation of Government Employees v. Federal Labor Relations Authority, D.C. Cir., 730 F.2d 1534, 1542-1547.

The Senate Report accompanying the bill, S.Rep. No. 1446, 90th Cong. 2d Sess., R. 236, says:

> "The concept of the technician program is that the technicians will serve concurrently in three different ways: (a) Perform full-time civilian work in their units; (b) perform military training and duty in their units; and (c) be available to enter active Federal service at any time their units are called."

At R. 254, the Report says:

> "The concept of the full-time civilian technician program is that his civilian work will be performed in the same unit in which he holds a mobilization assignment. In other words, the technician would perform his civilian work, his training duty, and be mobilized to active duty in the same unit... It is the view of the Committee, therefore, that technicians who are required to be military members of the National Guard should occupy a military position which is compatible with their civilian technician position."

See also the remarks of Congressman Pickle, 113 Cong. Rec. 3838 and

of Senator McIntyre, 114 Cong. Rec. 23,254-23,255.

Plaintiff also argues that the agency has impermissibly broadened the removal provisions of § 709(e)(1) because the term "grade" as used therein does not refer to the military unit in which the technician is serving. The Act need not contain this level of detail. In American Federation of Government Employees v. Federal Labor Relations Authority, D.C. Cir., 730 F.2d 1534, the court considered the argument that the National Guard was required to bargain over a union proposal to eliminate consideration of technician's military performance from reduction in force actions because the statute did not mention "'evaluations' or their use" in § 709(e). The court said, Id. 1544:

> "This argument is bootless. The Act need not descend to such detail. The evaluation and rating of personnel are implicit in every military organization, their use is fundamental and need not be explicated."

The Senate Report and the remarks of members of Congress show that Congress intended that technicians be compatible in their military and civilian unit assignments. Given such legislative history, it is inconceivable that regulations mandating compatibility should be interpreted as inconsistent with § 709(e). The military has great and wide discretion in the formation, application, and interpretation of military regulations. Noyd v. McNamara, 10 Cir., 378 F.2d 538, 540. We agree with the district court's holding that, R. 455, "a civilian technician ceases to hold the requisite 'military grade' when he or she is reassigned to a military unit from which the civilian duties cannot be performed."

Affirmed.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 81-C-2196

LEO L. MARTELON,

Plaintiff,

v.

EMMET H. WALKER, JR., Director, National Guard Bureau, JOHN L. FRANCE, Adjutant General, Colorado Department of Military Affairs; WILLIAM K. WHITE, PAUL A. PARSONS, STEPHEN T. ERICKSON, and JAMES T. MILLER,

Defendants.

ORDER

Plaintiff, Leo L. Martelon, filed this action seeking relief from his involuntary reassignment within and subsequent termination from the Colorado Army National Guard (Guard). Defendants are the plaintiff's supervisors in the Guard. Jurisdiction is founded on 28 U.S.C. §§ 1331, 1343(3).

The parties have filed cross-motions for summary judgment supported by extensive memoranda and exhibits. On July 28, 1983, I heard testimony and received evidence on these motions. The issues raised are ripe for determination.

Martelon sought full-time *civilian* employment in 1974 as an administrative supply technician for the Guard. A prerequisite to obtaining this civilian employment was prior enlistment for *military* service in the Guard. Martelon enlisted in the Guard as a staff sergeant on November 1, 1974, and was employed as an administrative supply technician starting on November 3, 1974.

Plaintiff's employment as a civilian technician required that he supervise the military materiel for the unit to which he was assigned. On June 21, 1983, he was reassigned involuntarily from the 220th Military Police Company to the 193rd Military Police Battalion. Plaintiff's

civilian employment was terminated on August 1, 1983, because his new assignment at the 193rd was incompatible with his continued employment as an administrative supply technician for the 220th. No comparable civilian job was available with the 193rd.

Plaintiff here asserts three claims for relief. First, he asserts a civil rights claim under 42 U.S.C. § 1983. He contends that he had a property right in continued civilian employment and the defendants' assigning him to a different post, thus "taking" his job rights, without a hearing, violated due process. Plaintiff seeks reinstatement to his civilian employment, compensatory damages, and punitive damages.

In considering claims of this nature, courts must exercise caution and self restraint to avoid interfering with military affairs. The United States Constitution grants control of the military to Congress, not the courts. U.S. Const. Art. I, § 8, cls. 12-14. "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment." *Chappell v. Wallace,* 51 U.S.L.W. 4733, 4735 (June 13, 1983).

The Constitution grants Congress broad power "[t]o provide for organizing, arming, and disciplining..." the National Guard. U.S. Const. Art. I, § 8, cl. 16. "It would be difficult to think of a clearer example of the type of government action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan v. Morgan,* 413 U.S. 1, 10 (1973).

In *Gilligan,* the Supreme Court determined that the District Court had no authority to grant relief for the National Guard's alleged violations of 42 U.S.C. § 1983. That case dictates the result here. I find and conclude that Martelon's claim seeking relief for alleged violations of 42 U.S.C. § 1983 raises issues not appropriate for determination in this court. A federal trial judge is not competent to review decisions of Army National Guard officers in assigning personnel, at least in the circumstances here presented. There is no genuine issue as to any material fact. Defendants are entitled to judgment as a matter of law on this claim. F.R.Civ.P 56(b). Thus, the defendants' motion for summary judgment on the plaintiff's first claim for relief is granted.

Plaintiff's second claim for relief alleges that his reassignment violated

his enlistment contract. However, the plaintiff has not cited, and I have not found, any section of the enlistment contract either guaranteeing his assignment to a specific military unit or limiting the Guard's ability to reassign him. Thus, I find that there is no genuine issue of material fact on this issue and conclude that the plaintiff's breach of contract claim is unsupported. The defendants, therefore, are entitled to summary judgment on this claim as well.

Plaintiff's third claim alleges that termination of his civilian employment violated 32 U.S.C. § 709. Defendants respond that termination of the plaintiff's employment was authorized by 32 U.S.C. § 709(e)(1) and was within the Guard's inherent power to reassign personnel to help ensure national security.

Congress has required that "a technician who is employed in a position in which National Guard membership is required as a condition of employment and who...ceases to hold the military grade specified for his position..." shall be relieved from his civilian position. 32 U.S.C. § 709(e)(1). In *Allen v. United States,* 571 F.2d 14 (Ct. Cl. 1978), the court held in similar circumstances that "civilian duties cannot stand alone to comprise a job distinct from the military activities." *Id.* at 18. Further, a Senate Armed Service Committee report states that the civilian technician program requires that a civilian technician's work be performed in the same unit in which he or she holds a military assignment. S. Rep. No. 1446, 90th Cong., 2d Sess. (1968).

I find and conclude that a civilian technician ceases to hold the requisite "military grade" when he or she is reassigned to a military unit from which the civilian technician duties cannot be performed. Thus, the defendants' termination of the plaintiff's employment was authorized by 32 U.S.C. § 709(e)(1).

Further, I find and conclude that the Guard has the inherent power necessary to terminate a technician's employment if the technician's reassignment to a different military unit is incompatible with his or her civilian employment. The defendants' motion for summary judgment on the plaintiff's third claim for relief is granted.

Accordingly,

IT IS ORDERED that this action is dismissed with prejudice, each party to bear his own costs.

Dated at Denver, Colorado, August 5, 1983.

BY THE COURT:

JIM R. CARRIGAN, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX 3

NOVEMBER TERM — December 7, 1984

Before Honorable James K. Logan, Honorable Jean S. Breitenstein and Honorable Robert H. McWilliams, Circuit Judges.

LEO L. MARTELON,

Plaintiff-Appellant,

v.

MAJOR GENERAL HERBERT R. TEMPLE, Jr., etc., et al.,

Defendants-Appellees.

No. 83-2141

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, appellant's petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

APPENDIX 4

7-3. EMPLOYMENT POLICY

The provisions of 32 U.S.C. 709 (PL 90-486) requires that "...a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the Adjutant General of the jurisdiction concerned;..." (and) "a technician shall be notified in writing of the termination of his employment as a technician, and such notification shall be given at least 30 days prior to the termination date of such employment." All appointments, reassignments, or promotions to positions that require military membership will be in the excepted Federal service, and candidates will meet all qualification requirements prior to placement.

a. The following are requisite for technician employment:

(1) All technicians must maintain appropriate military membership, military grade, and branch of service (except as provided for in paragraph 7-9) for the technician position occupied; meet the required military security standards; and meet the military physical requirements appropriate for the compatible military assignment.

(2) General officers may not be employed as technicians, unless the technician position description requires the incumbent to be a commander of a tactical combat unit.

(3) Technicians may not be assigned as Assistant/Deputy Adjutant General.

b. Technicians who do not meet the above will be given a written 30-day advance notice of termination and promptly separated.

Notification of separation. Before a request for Federal recognition that adversely affects a technician's tenure (i.e., promotion to general officer, enlisted technician receiving a commission) is sent to the NGB, the technician will be notified by the TPO regarding the effects Federal recognition will have on his technician employment (see S-11, TPR 8311). As a minimum, the notification should be in letter form (see TPR 302.C). The technician will sign and date the letter acknowledging that he has been notified and understands that termination from technician

employment will follow. The signed letter will also reflect the technician's decision to discontinue/continue the Federal recognition process.

If the technician elects to continue the Federal recognition, processing the letter will serve as the advance written notice of termination. A copy of the signed letter will then become a part of the Federal recognition paperwork that is forwarded to the NGB. The letter will be dated when signed by the technician, and that date will serve as the 30-day advance notice period for termination. The actual start of the 30-day notice period begins the day after the date shown on the letter. This letter authorizes the technician's termination concurrently upon receipt of Federal recognition, provided the 30-day advance notice period has elapsed. No such separations will be made effective during the period of 15 December through 3 January.

Military Disqualifications. Except for pending disability retirement claims, technicians who are found to be unqualified for further Guard membership may continue to be employed in their technician position for no more than 30 days after loss of military membership. When the date of the military action is known in advance, the 30-day notice will be issued at the earliest practicable date so, when possible, the military and technician actions will coincide. No such separations will be effected from 15 December through 3 January.

Voluntary Military Disqualification. When a technician takes a voluntary action that alters his military status (i.e., applies for a commission, acknowledges his intention to resign from the Guard or not to reenlist, accepts certain promotions, etc.), immediate steps should be taken by the TPO to notify the individual regarding loss of technician employment. The notification should address loss of benefits, ineligibility for severance pay and discontinued service retirement, etc.

The technician should sign a statement acknowledging that he understands the effects of such action on his technician employment. The statement will be dated when signed by the technician and will serve as the 30-day advance notice period of termination. The actual start of the 30-day notice period begins the day after the date shown on the statement. The statement authorizes the technician's termination when the military action is effected, provided the 30-day notice period has elapsed. No such separations will be effected from 15 December through 3 January.

APPENDIX 5

7-9. TECHNICIAN/MILITARY COMPATIBILITY

A National Guard technician must be assigned to an appropriate military unit (to include military grade and specialty) in the State where his technician job is located (see 32 U.S.C. 709 (b)). The concept of the National Guard technician program is that technicians will be militarily assigned to the same unit in which his technician job is located. In other words, a technician will perform his technician duties, his military training duties, and be mobilized to active duty in the same unit. Unless specifically approved by NGB-TN, the assignment will be in the unit by which employed, and the technician must be performing in the MOS/AFSC determined to be compatible with the technician position occupied. Situations of military or technician grade inversion are not permitted; i.e., a technician is subordinate to an individual in technician status but senior to him in a military status.

Adjutants general may approve exceptions to compatibility in the following instances:

a. If the military appointment requirements (officer, warrant officer, enlisted) for a particular position change, and the change would disqualify the technician for employment, he may be continued in an incompatible status. A continuing effort must be made to reassign these technicians to compatible positions.

b. One-year exceptions may be granted to permit military assignments for officer technicians to gain command experience. Extensions beyond one year must be submitted to NGB-TN and must clearly document and substantiate the request. All locally approved situations that fall into the above categories must be documented, approved by the State Adjutant General, or his designee, and filed in the temporary side of the technician's Official Personnel Folder.

c. Technicians assigned as USPFO examiners may occupy military positions in the ANG. Other USPFO positions may be occupied by members of the ANG when authorized by the Chief, National Guard Bureau. Any case that is not clearly covered by the above is to be forwarded to NGB-TN for a policy determination. Requests must outline all circumstances that have a direct bearing on the case.

APPENDIX 6

2-3. FAILURE TO MEET THE REQUIREMENTS OF THE POSITION

a. When a technician can no longer meet the requirements of the technician position, removal from the position is required. This includes such situations where a technician loses flying status; is physically unable to perform his duties; fails to meet the security standards of his compatible military assignment; fails to meet the medical requirements of his technician position/compatible MOS/AFSC; or fails to maintain the military grade/rank, branch of service, or compatible military assignment for the technician position occupied. (See paragraph 2-4 for specific guidance on the Federal recognition process.)

b. As appropriate, management may remove the individual from his technician position by reassignment, change to lower grade, or termination. The placement offer must be made in writing and include an explanation as to why the action is being taken. The technician will be given a reasonable amount of time (normally 10 days) to accept or reject the offer. The technician must be advised that rejection of the offer will result in termination from employment and that the 30-day advance notice required by 32 U.S.C. 709(e)(6) starts the day after the technician receives the offer.

c. If no placement actions are made, a written notice of termination, which includes explanation as to why the action is being taken, must be given to the technician at least 30 days before the termination date.

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No. 84-1415

In the Supreme Court of the United States

OCTOBER TERM, 1984

LEO L. MARTELON, PETITIONER

v.

HERBERT R. TEMPLE, JR.,
DIRECTOR OF THE NATIONAL GUARD BUREAU, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner alleges that his military superiors violated his statutory and constitutional rights in connection with the termination of his employment as a civilian technician in the Colorado Army National Guard.

1. Petitioner sought full-time employment as a civilian administrative supply technician in the Colorado Army National Guard in 1974 and "was informed in writing that his employment was 'contingent upon membership in the Colorado National Guard' " (Pet. App. 2).[1] Petitioner

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[1]National Guard technicians are full-time civilian employees with responsibility for "(1) the administration and training of the National Guard; and (2) the maintenance and repair of supplies issued to the National Guard or the armed forces" (32 U.S.C. 709(a)). The relevant statute provides that, in general, "a [National Guard] technician * * * shall, while so employed, be a member of the National Guard * * *" (32 U.S.C. 709(b)).

enlisted in the Guard on November 1, 1974, and was hired on November 3, 1974, as an administrative supply technician assigned to the 220th Military Police Company. He was responsible for supervising the unit's military materiel. Pet. App. 2, 9. Petitioner's military assignment also was to the 220th Military Police Company.

In June 1981,[2] a new military commander was assigned to the 220th Military Police Company and petitioner was relieved of his military duty as First Sergeant of the unit. He was transferred to the 193rd Military Police Battalion headquarters. Pet. App. 2, 9; Pet. 5. The court of appeals found that "[t]he record amply demonstrates the dissatisfaction of [petitioner's] superiors with [petitioner's] military performance. The record also shows that the dissatisfaction was the cause of [petitioner's] transfer" (Pet. App. 4 (citation omitted)).[3] Petitioner's new military unit did not have an available civilian technician position comparable to petitioner's position with the 220th Military Police Company. The National Guard concluded that petitioner's new military assignment was incompatible with his continued civilian employment as an administrative supply technician because he could not serve as a technician in his new military unit. Petitioner's civilian job therefore was terminated effective August 1, 1981. *Id.* at 2, 9-10; Pet. 5.

Petitioner made several written requests to his military superiors for reversal of his military reassignment, but the requests were not successful. He then filed this lawsuit in the United States District Court for the District of Colorado, alleging that the termination of his employment was not authorized by the statute governing employment of

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[2]The decisions of the courts below erroneously identify the year as 1983.

[3]The 220th Military Police Company suffered substantial losses of equipment during the time petitioner was assigned to the unit (see R. 88-129).

National Guard technicians and that he had been deprived of his right to due process in violation of 42 U.S.C. 1983.[4] Petitioner sought reinstatement, back pay and benefits, compensatory and punitive damages, and attorney's fees and costs.

2. The district court granted summary judgment in favor of respondents (Pet. App. 9-11). It first concluded that the Section 1983 claim raised issues that were not appropriate for judicial determination because "[a] federal trial judge is not competent to review decisions of Army National Guard officers in assigning personnel, at least in the circumstances here presented" (Pet. App. 10). Second, the court found that the Guard acted within its authority by terminating petitioner's civilian employment after petitioner was militarily reassigned to a unit in which he could not serve as a civilian technician.

The court of appeals affirmed (Pet. App. 1-7). The court noted that petitioner did not contest the Guard's right to transfer him to a different military unit (*id.* at 3), and that the termination of petitioner's civilian employment was "clearly related to [his] military employment" because it was a result of his military transfer (*id.* at 4). Relying on this Court's decisions in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), and *Feres* v. *United States*, 340 U.S. 135 (1950), the court of appeals held that petitioner's claim was not cognizable under Section 1983 because that provision does not supply grounds for a suit against superior officers challenging a military decision (Pet. App. 3-5).

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[4]Petitioner also alleged that the reassignment violated his enlistment contract, but he abandoned that issue in the court of appeals (Pet. App. 2) and has not raised the contract claim in this Court.

The court of appeals also concluded that petitioner's termination was authorized by the National Guard Technicians Act of 1968, 32 U.S.C. (& Supp. I) 709, and the regulations promulgated thereunder. The court relied (Pet. App. 6) upon statements in the Act's legislative history indicating that Congress viewed a technician's civilian duties as inseparable from his military obligations. The court of appeals found that petitioner's dismissal was appropriate under 32 U.S.C. 709(e)(1), which requires dismissal when a technician ceases to hold the military grade specified for his position. It agreed with the district court's conclusion that " 'a civilian technician ceases to hold the requisite 'military grade' when he or she is reassigned to a military unit from which the civilian duties cannot be performed.' " Pet. App. 7.

3. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Therefore, further review by this Court is not warranted.

a. Petitioner's challenge to the termination of his civilian employment is wholly without merit. The National Guard is "an integral part of the first line defenses of the United States," providing operationally ready combat and support units that can be integrated quickly into the regular armed forces in times of crisis. 32 U.S.C. 102; see also *Maryland* v. *United States*, 381 U.S. 41, 46, vacated on other grounds, 382 U.S. 159 (1965). The Guard employs civilian technicians because National Guard members are not on full-time active duty. 32 U.S.C. 709(a); see also *Maryland* v. *United States*, 381 U.S. at 49. These technicians "serve concurrently in three different ways: (*a*) Perform full-time civilian work in their units; (*b*) perform military training and duty in their units; and (*c*) be available to enter active Federal Service at any time their units are called." H.R. Rep. 1823, 90th Cong., 2d Sess. 2 (1968); see also S. Rep. 1446, 90th Cong., 2d Sess. 2 (1968).

In enacting the National Guard Technicians Act of 1968, Congress indicated that "[t]he concept of the full-time civilian technician program is that [the technician's] civilian work will be performed in the same unit in which he holds a mobilization assignment." S. Rep. 1446, *supra*, at 20.[5] The applicable regulations provide that "[t]he concept of the National Guard technician program is that technicians will be militarily assigned to the same unit in which his technician job is located. In other words, a technician will perform his technician duties, his military training duties, and be mobilized to active duty in the same unit." Technician Personnel Reg. 302.7-9 (Mar. 17, 1981).

Petitioner could not satisfy this requirement after his military transfer, and the termination of his civilian employment therefore was mandatory under the applicable statute and regulations. Section 709(e) provides in pertinent part:

> Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—
>
> > (1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who * * * ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment * * *.

The courts below correctly concluded that the regulation providing that a technician will perform his civilian work in his military unit establishes a "military grade" requirement

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[5] A technician could not be integrated quickly into his military unit in times of emergency if he were a member of a military unit other than the unit he served in his civilian capacity. Moreover, if the technician were required to leave his civilian unit, that unit would be deprived of one of its key personnel.

within the meaning of this provision. See Pet. App. 5-7, 11. Since petitioner did not satisfy this requirement after his transfer, his removal under Section 709(e)(1) was proper.[6]

Petitioner now asserts (Pet. 15) that his military reassignment was improper because he should have been assigned to a National Guard unit that had an opening for a civilian technician. This claim is flawed for several reasons. First, petitioner did not present this argument in the court below (see Pet. App. 3) and is therefore barred from raising the issue in this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Second, petitioner is incorrect on the merits. Nothing in the statute or regulations prohibited the Guard from reassigning petitioner to the 193rd Military Police Battalion. The military considerations underlying assignments obviously cannot be subservient to the needs of civilian technicians.[7] Finally, petitioner's challenge to this military personnel decision would involve an inquiry into military decisionmaking of the type that this Court previously has found to be improper. See *Chappell* v. *Wallace*,

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[6]Regulation 752.2-3 (Aug. 16, 1982), which was promulgated after petitioner's employment was terminated, states that "[w]hen a technician can no longer meet the requirements of the technician position, removal from the position is required." It makes clear that failure to maintain a "compatible military assignment for the technician position occupied" is grounds for removal (*ibid.*).

Petitioner asserts (Pet. 13) that this result conflicts with the definition of "grade" in another portion of Title 32, but Section 709(e) provides that the termination provisions must be read in light of the relevant regulations. The regulation specifying the importance of compatibility in military and civilian assignments renders Section 709(e)(1) applicable to petitioner's situation.

[7]Petitioner relies (Pet. 15) upon a portion of Technician Personnel Reg. 302.7-9 (Mar. 17, 1981) relating to assignment of technicians, but the regulation does not bar reassignments necessary for military reasons.

462 U.S. 296 (1983); *Gilligan* v. *Morgan*, 413 U.S. 1 (1973); *Feres* v. *United States*, 340 U.S. 135 (1950).

b. Petitioner also argues (Pet. 7-12) that the courts below improperly rejected his claim that he was deprived of his constitutional right to due process because he was not afforded a hearing in connection with the termination of his civilian employment. In *Codd* v. *Velger*, 429 U.S. 624 (1977), this Court stated that a failure to provide a hearing constitutes a denial of due process only if the hearing would "serve [a] useful purpose" (*id.* at 627). Since petitioner did not contest the propriety of his military transfer, a hearing is not required to resolve any factual dispute concerning that action. The statutes and regulations mandated the termination of petitioner's civilian employment following his military transfer, and any arguments presented at a hearing concerning the appropriateness of the termination would be wholly irrelevant. Therefore, petitioner's due process claim is fatally flawed because he cannot show "that he was harmed by the denial of a hearing" (*Codd* v. *Velger*, 429 U.S. at 628).

In addition, petitioner's claim is not cognizable under Section 1983 because it would require judicial review of a military personnel decision. In *Chappell* v. *Wallace*, *supra*, this Court cited the "unique relationship between the Government and military personnel" (462 U.S. at 299) in unanimously concluding that military personnel could not bring suit against their superior officers for constitutional violations under *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The Court stated that "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment" (462 U.S. at 300).

Petitioner's claim raises this very issue. The reason for the termination of his civilian job was a military transfer brought about by dissatisfaction with petitioner's performance of his military duties. Thus, the claim necessarily would involve consideration of the propriety of a military personnel determination, the type of inquiry found improper in *Chappell*. See Pet. App. 3-5.[8]

Petitioner asserts (Pet. 7-9) that there is a conflict among the courts of appeals concerning the applicability of Section 1983 to National Guard technicians' challenges to employment terminations. However, the only other court of appeals to address the validity of such a Section 1983 claim in view of its intrusion into military affairs also has refused to adjudicate the claim. *NeSmith* v. *Fulton*, 615 F.2d 196, 201-203 (5th Cir. 1980); see also *Schultz* v. *Wellman*, 717 F.2d 301, 306 (6th Cir. 1983) (relying upon *NeSmith* in declining to review the plaintiff-technician's challenge to the grounds for his dismissal). The other decisions cited by

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[8]Petitioner attempts (Pet. 9-12) to distinguish the present action from *Chappell* because it arises under Section 1983. However, in *Chappell*, the Court relied upon *Gilligan* v. *Morgan*, *supra*, in which the Court held that a suit under 42 U.S.C. 1983 challenging the training of National Guard personnel could not be maintained because control of that issue was vested in the Legislative and Executive Branches. Moreover, the courts of appeals have recognized that the considerations underlying *Chappell* also apply to actions under the civil rights statutes. See, *e.g.*, *Brown* v. *United States*, 739 F.2d 362, 366-367 (8th Cir. 1984); *Mollnow* v. *Carlton*, 716 F.2d 627, 630-632 (9th Cir. 1983). Petitioner is correct (Pet. 9-12) that the courts of appeals have used slightly different analytic approaches in applying *Chappell* in this context, but the results have been the same — the courts of appeals uniformly have refused to examine military decisions in suits under civil rights statutes.

Petitioner also suggests (Pet. 10-12) that a different rule should apply to his claim for injunctive relief. However, the claim in *Gilligan* v. *Morgan*, *supra*, sought declaratory and injunctive relief and the Court held the action barred on this ground.

petitioner all pre-date *Chappell* and do not concern the propriety of judicial review of military decisions.[9] Petitioner has not cited a single decision rejecting the applicability of *Chappell* in this context.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1985

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[9]This Court's decision in *Tennessee* v. *Dunlap*, 426 U.S. 312 (1976), similarly is inapposite. In that case the Court *rejected* the technician's due process claim. The decision therefore does not provide any support for the due process claim asserted by petitioner.

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